United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

To be argued by:
RALPH McMURRY

75-7099

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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GEORGE BEDROSIAN and THOMAS HAGAN, ROBERT HANDELMAN and BERNARD SHIPMAN, WALTER WILLIAMS and OTIS McGAUGHY COMAR SEKOU TOURE, and all others similarly situated,

Plaintiff-Appellants,

v.

JOSEPH D. MINTZ, Administrator, Erie County Bar Association Aid to Indigent Prisoners Society, Inc.; THE ERIE COUNTY BAR ASSOCIATION AID TO INDIGENT SOCIETY, INC.; and CARMAN F. BALL, Justice of the Supreme Court and Presiding Judge of the Additional Special and Trial Term of the Wyoming County Court, in his representative and individual capacity,

Defendant-Appellees.

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B

P/S

75-7099

BRIEF FOR APPELLEE HON. JUSTICE BALL

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BRIEF FOR APPELLEE
HON. JUSTICE BALL

Statement

This is an appeal from an order of the United States District Court for the Western District of New York dated January 6, 1975 (Curtin, J), granting defendants' motion to dismiss a complaint brought pursuant to 42 U.S.C. § 1983 for failure of the plaintiffs to present a substantial federal question.

Questions Presented

1. Whether the supervision by this Court of appellee Justice Ball in his discretionary judicial functions in a state court would constitute a totally unwarranted intrusion into the affairs of the state judiciary and offend fundamental principles of federal-state comity?

2. Whether the assignment of counsel in state criminal proceedings is within the sole discretion of the trial court, and whether the exercise of this discretion by appellee Justice Ball violated any constitutional rights of plaintiffs?

3. Whether the reasonable exercise of discretion by appellee Justice Ball (A) may be disturbed by this Court through the extraordinary remedy of mandamus, and (B) is entitled to judicial immunity?

Facts

The defendant and appellee Carman F. Ball is a Justice of the Supreme Court of the State of New York. Justice Ball was assigned by the Appellate Division, Fourth Department, to preside over a Special Term of the Supreme Court for the County of Wyoming, at Warsaw, New York, with jurisdiction over cases arising out of the Attica prison revolt of September 9-13, 1971. One of Justice Ball's responsibilities was the assignment of counsel to the Attica indictees.

The County of Erie established a system whereby indigent prisoners are assigned counsel and legal fees pursuant to Section 18b of the New York County Law. Under this program, the assignment of counsel is made by the court. Defendants do not have a right to select a particular counsel to be assigned.

Justice Ball laid down ground rules for the assignment of counsel. These rules were applied to everyone equally. Each defendant was advised of his right to counsel of his own choice and that if he did not have sufficient funds to hire counsel, counsel would be assigned in accordance with Article 18b of the County Law. Some defendants chose to reject assigned counsel and represent themselves. Some defendants retained counsel, and some defendants retained counsel from out-of-state. Justice Ball in his discretion permitted such out-of-state attorneys to appear for their clients pro hac vice. However Justice Ball made it clear to both defendants and their out-of-state attorneys that the attorneys would not be assigned as counsel by the court, and thus would not receive compensation from the State of New York.

Justice Ball gave rational reasons for his policy. Those reasons were: (1) there were attorneys licensed to practice in New York who were able and ready to accept

assignments; (2) the court was unfamiliar with the background of out-of-state attorneys, in that their competence and understanding of New York State law and criminal procedure was not certified to by having passed the New York State Bar Examination, and (3) the expenses involved-transportation, accommodations, etc., would be an excessive burden on public funds of New York State set aside for the legal defense of defendants. (See Ball affidavit).

Proceedings in State Court

A member of the alleged class, one Ernest Goodman, a Michigan attorney, brought an Article 78 proceeding in the Appellate Division, Fourth Department, seeking to compel Justice Ball to assign and reimburse him as counsel for his client, an Attica indictee. The Appellate Division held that the Article 78 proceeding for mandamus "cannot be used as a substitute for appeal to challenge a determination made by a court in a criminal matter in the exercising of its discretion." Goodman v. Ball, 45 A D 2d 16 (4th Dept. 1974. The State Court of Appeals denied leave to appeal, 34 N Y 2d 519.

Proceedings in Federal District Court

Plaintiffs brought suit in the United States District Court for the Western District of New York by a complaint

dated June 4, 1974. Plaintiffs purported to bring the action pursuant to 42 U.S.C. § 1983. Plaintiffs claimed that the refusal of Justice Ball to assign out-of-state counsel was a violation of the following provisions of the Constitution: the privileges and immunities clause, right to effective assistance of counsel, the interstate commerce clause and the equal protection clause. Plaintiffs demanded declaratory relief and a mandatory injunction ordering Justice Ball to appoint attorney-plaintiffs as counsel for indictee-plaintiffs.

Plaintiffs moved for summary judgment and defendants moved to dismiss. The District Court, Curtin, J, held that the assignment of counsel is within the sole discretion of the state court judge and was not reviewable under 42 U.S.C. § 1983. The court granted defendants' motion to dismiss for failure of the plaintiffs to present a substantial federal question.

POINT I

SUPERVISION BY THIS COURT OF APPELLEE JUSTICE BALL IN THE EXERCISE OF HIS DISCRETIONARY JUDICIAL FUNCTIONS IN A STATE COURT WOULD CONSTITUTE A TOTALLY UNWARRANTED INTRUSION INTO THE AFFAIRS OF THE STATE JUDICIARY AND OFFEND FUNDAMENTAL PRINCIPLES OF FEDERAL-STATE COMITY

The United States Supreme Court in Harris v. Younger, 401 U.S. 37 (1971), declared that the federal courts will not enjoin pending state criminal prosecutions except under extra-

ordinary circumstances. At the heart of Younger v. Harris was the "longstanding public policy against federal court interference with state court proceedings." Younger v. Harris, supra, 401 U.S. 37 at 43. If this public policy of federal court reluctance to interfere in state court proceedings is valid with respect to injunctions against state criminal prosecutions, still less should the federal courts be inclined to grant equitable relief on issues of discretion for the state trial court which are completely collateral to the prosecution itself, such as assignment of counsel.

Notwithstanding this fundamental and clearly applicable principle, plaintiff-attorneys seek relief in a federal court by way of mandatory injunction to have themselves assigned as counsel in a state court criminal trial. Plaintiffs totally ignore the nature of the relationship that does exist and ought to exist between the federal and state judiciaries.* The mandatory relief sought by plaintiffs would constitute an unwarranted intrusion by the federal judiciary into the conduct of the state court judiciary. Such an intrusion cannot be tolerated under fundamental principles federal-state comity.

These principles were recently reaffirmed by the United States Supreme Court in O'Shea v. Littleton, 414 U.S. 488

* This issue is not once mentioned in plaintiffs' brief.

(1974). In O'Shea, the plaintiffs brought suit pursuant to 42 U.S.C. § 1983 against a state court judge who allegedly was engaged in unconstitutional bond setting, sentencing, and jury fee practices in criminal cases. The plaintiffs sought injunctive relief. The Supreme Court (at 409-501) forcefully rejected this prayer for relief on comity grounds:

> ". . . recognition of the need for a proper balance in the concurrent operation of federal and state courts counsels restraint against the issuance of injunctions against state officers engaged in the administration of the state's criminal laws in the absence of a showing of irreparable injury which is 'both great and immediate'. . .[citations omitted]
>
> . . . What they seek is an injunction aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials. . . this seems to us nothing less than an ongoing federal audit of state criminal proceedings which would indirectly accomplish the kind of interference that Younger v. Harris, supra and related cases, sought to prevent.
>
> A federal court should not intervene to establish the basis for future intervention that would be so intrusive and unworkable. . . the object is to sustain "the special delicacy of the adjustment to be preserved between federal equitable power and state administration of its own law." [Citations omitted]

O'Shea v. Littleton is directly applicable to the case at bar. There, as here, plaintiffs sought equitable relief against a state court judge allegedly exercising his discretion on collateral issues in the criminal process in an unconstitutional manner. For the very same reasons

expressed in O'Shea v. Littleton, injunctive relief in the case at bar is totally inappropriate.*

Justice Frankfurter eloquently stated the applicable law a quarter century ago in Stefanelli v. Minard, 342 U.S. 117 (1951).** In that case, plaintiffs sought under the Civil Rights Act in federal court to enjoin the use of illegally seized evidence in a state court trial. Justice Frankfurter, in the Court's opinion, first stated (at 120) the basic comity principle:

* The Supreme Court's recent decision in Gerstein v. Pugh, 95 S. Ct. 845 (1975) lends further weight to this argument.

The Supreme Court in Gerstein v. Pugh, upheld a federal court's grant of injunctive relief directed at correcting a state court procedure which failed to provide for the determination of the legality of pretrial detention without a hearing. The Supreme Court ruled that the equitable restrictions on federal intervention in state prosecutions, as stated in Younger v. Harris, did not apply because the injunction was only directed at an issue that could not be raised in defense of the criminal prosecution and would not prejudice the conduct of the trial on the merits. 95 Sup. Ct. at 860, fn. 9. The relief sought here, however, obviously affects the conduct of the trial on the merits, and unlike the relief sought in Gerstein, is not directed at a state court procedure, defective on its face, but at the discretion of a trial judge on a collateral issue. In such a case, the equitable considerations of Younger v. Harris clearly apply. O'Shea v. Littleton, supra. It is significant that the Supreme Court in Gerstein v. Pugh cited with approval its previous decision in Stefanelli v. Minard, 342 U.S. 117 (1951), quoted infra.

** Cited with approval in Gerstein v. Pugh, supra, at 860, fn. 9.

> For even if the power to grant the relief here sought may fairly and constitutinally be derived from the generality of language of the Civil Rights Act, to sustain the claim would disregard the power of courts of equity to exercise discretion when, in a matter of equity jurisdiction, the balance is against the wisdom of using their power. Here the considerations governing that discretion touch perhaps the most sensitive source of friction between states and nation, namely, the active intrusion of the federal courts in the administration of the criminal law for the prosecution of crime solely within the power of the states.
>
> . . .The special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law, has been an historic concern of congressional enactment. [Statutes cited]"

Justice Frankfurter then noted that abstention of the federal courts under the comity principle was particularly appropriate where the issues involved in the state court were collateral ones:

> "If these considerations limit federal courts restraining state prosecutions merely threatened, how much more cogent are they to prevent federal interference with proceedings once begun. If the federal equity power must refrain from staying state prosecutions outright to try the central question of the validity of the statute on which the prosecution is based, how much more reluctant must it be to intervene piecemeal to try collateral issues. [footnote]

> The consequences of exercising the equitable power here involved are not the concern of a merely doctrinaire alertness to protect the proper sphere of the states in enforcing this criminal law. If we were to sanction this intervention, we would expose every state criminal prosecution to insupportable disruption. Every question of procedural due process of law - with its far flung and undefined range - would invite a flanking movement against the system of state courts by resort to the federal forum, with review if need to be this Court, to determine the issue [including] . . . failure to appoint counsel. Stefanelli v. Minard, supra, at 122-123, (emphasis added).

In sum, it would be totally inappropriate for this Court to interfere in Justice Ball's discretionary decision on the collateral issue of assignment of counsel in a state court trial, especially where the essence of plaintiffs claim boils down to nothing more than the wholly untenable proposition that plaintiff indictees have the constitutional right to have out-of-state counsel of their choice assigned. Comity, the Supreme Court's "lodestar of adjudication" in this situation (Stefanelli v. Minard, supra, at 121), compels a summary rejection of plaintiffs' claim.

POINT II

THE ASSIGNMENT OF COUNSEL IN A STATE CRIMINAL PROCEEDING IS WITHIN THE SOLE DISCRETION OF THE TRIAL COURT. THE EXERCISE OF THAT DISCRETION BY APPELLEE JUSTICE BALL VIOLATED NO CONSTITUTIONAL RIGHTS OF PLAINTIFFS

The assignment of counsel for indigent Attica

defendants is within the sole discretion of appellee Justice Ball. It is well settled that the assignment of counsel to an indigent defendant in a criminal case is a matter of discretion for the trial court, and it is equally well settled that the trial court need not appoint a particular counsel of defendant's choice. United States v. Tortola, 464 F 2d 1202, 1210 (2d Cir. 1971); United States ex rel. Torry v. Rockefeller, 361 F. Supp. 422 (W.D.N.Y. 1973); Davis v. Stevens, 326 F. Supp. 1182 (S.D.N.Y. 1971); State of Ohio v. Ross, 304 N.E. 2d 396, 36 Ohio App. 2d 185 (1973).

It is also well settled that the states have the right to establish their own rules and qualifications for the practice of law within their respective jurisdictions, and that the states have a substantial interest in the exercise of this power. Among those interests are the administration of a uniform and efficient legal system, which is furthered by a bar familiar with intricacies of state procedure and the informal traditions of local practice and which is particularly learned in the substantive law of the state. The state also has an interest in regulating the qualifications and conduct of counsel and the amenability of counsel to disciplinary proceedings.

It follows that a license to practice law granted by the courts of one state have no territorial effect or value and can vest no right in the holder to practice law in another state. Martin v. Walton, 368 U.S. 25 (1968); Law Students

Research Council v. Wadmond, 401 U.S. 154, 159-160 (1971); Sperry v. Florida, 373 U.S. 379, 383 (1963); Konigsberg v. State Bar, 366 U.S. 36, 40 (1961); Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232, 239 (1957); Brown v. Supreme Court of Virginia 359 F. Supp. 559, 555, affd. 414 U.S. 1034 (1973); Thomas v. Cassidy, 249 F 2d 91 (4th Cir. 1957), cert. den. 355 U.S. 948, appeal dismissed 257 F 2d 812; State of Ohio v. Ross, supra; See Retaining Out of State Counsel, Evolution of a Federal Right, 67 Columbia Law Rev. 731, 732.

Notwithstanding these well established principles, plaintiffs claim Justice Ball's exercise of discretion violates the interstate commerce clause, privileges and immunities clause, equal protection clause, and the constitutional right to effective assistance of counsel. Plaintiffs in their brief argue their cause "in the equal protection framework with reference to the other provisions where appropriate." (Pl. Br. p. 11) The precise relationship between the "equal protection framework" and the "other provisions" is not made clear. In any event, neither singly nor in their totality do these arguments have any merit.

A. Equal Protection

Plaintiffs claim that Justice Ball's exercise of

discretion not to assign out of state counsel violates the equal protection clause. This argument is totally without merit.

At the outset, plaintiffs' statement of the equal protection issue in their brief (Pl. Br., p. 1, Issue 2) is inaccurate. The premise in plaintiffs' statement of the issue, that Justice Ball agreed to the assignment of lawyers chosen by defendants, is not correct. Justice Ball never made any such agreement. He undertook his duty to assign counsel where necessary, but that assignment was always a matter left to the court's discretion, not to the defendants' choice.

On some occasions, the court in its discretion accommodated the wishes of a defendant and assigned the attorney who was originally retained by the defendant on a showing of insufficient funds. Mi[illegible] affidavit, para. 10. On still other occasions the court in its discretion allowed defendants to choose as assigned counsel New York licensed attorneys outside the Erie County area because of the extraordinary circumstances of the Attica cases. Ball affidavit, para. 10. However at all times the ultimate prerogative of assignment of counsel belonged to Justice Ball acting in his discretion.

* Limitation of such choices to New York counsel has a rational basis. See p. 3-4, infra.

Plaintiff's equal protection argument boils down to the proposition that if an Attica indictee retains out-of-state counsel of his choice, Justice Ball has a constitutional obligation to appoint that attorney as counsel even though all indictees who do not retain out of state counsel do not have a right to assigned counsel of their choice. Thus, far from asking for the same rights given to all other Attica indictees, plaintiff-indictees are requesting rights not afforded all other Attica indictees. This is a strange equal protection argument indeed. To state the proposition is to refute it. Plaintiff-indictees' argument in essence is that they have a right to assigned counsel of their choice.

Plaintiffs urge emphatically that they are not arguing that a defendant has the right to assigned counsel of his choice. They purport to accept the proposition that the choice of an assigned counsel is for the judge, not the defendant. (Pl. Br. 7). However, if plaintiffs arguments are accepted, the result obtained is necessarily a right to assigned counsel of choice.

Plaintiffs argue that Justice Ball could not limit the assignment of counsel to Republicans or redheads without violating the Constitution. However that is obviously not

the issue or the case here. Justice Ball's exercise of his discretion was based on entirely rational and reasonable grounds. The state's interest in regulating the conduct and qualifications of counsel, limiting assignment to attorneys whose understanding of state law has been certified to through passing a bar examination and who are amenable to the state bar's disciplinary process, and limiting expenditure of state funds to such attorneys, is a reasonable and compelling one.*

The decision of this Court in Spanos v. Skouras Theatres Corp., 364 F 2d 161 (2d Cir. 1966) is of no assistance to plaintiffs in the case at bar. Spanos refused to apply state laws restricting out-of-state counsel to an out-of-state attorney in a case in a federal court. This Court in Spanos held that such counsel was necessary and appropriate for the assertion of a federally created right and hence was a "privilege and immunity" protected under the Fourteenth Amendment. There was no finding of an equal protection violation as is claimed here. Moreover, the instant case is clearly dis-

* The inquiry ends here. Since Justice Ball's exercise of discretion was lawful and proper, the questions of competence, expenses, air fares, etc., discussed by plaintiffs at such great length, are simply irrelevant. As to air fares and expenses, obviously Justice Ball could not be sure that some indictees would not retain attorneys from remote jurisdictions such as Hawaii, California, etc. As to the other factors, it is significant that while plaintiff-attorneys claim their competence was never in doubt, no mention is made as to their understanding of New York Law, one of the bases of Justice Ball's assignment policy.

tinguishable from Spanos in that it concerns out-of-state attorneys attempting to practice in state courts where federally created rights are not involved.*

Although plaintiffs cite a legion of patently inapposite and distinguishable cases to support their equal protection claim, plaintiffs have conveniently ignored two Supreme Court decisions and several Courts of Appeals decisions which completely dispose of their contentions.

In Martin v. Walton, 368 U.S. 25 (1968), the United States Supreme Court upheld Kansas statutes and rules that denied a Kansas resident licensed to practice law in Kansas the right to practice law in Kansas without associating with a local counsel, solely because he practiced regularly in Missouri where he was also licensed. The Supreme Court held that the Kansas policy was not beyond the allowable range of state action under the Fourteenth Amendment, and dismissed the appeal for want of substantial federal question. The court also said (at 26):

> "We cannot disregard the reasons given by the Kansas Supreme Court for the Rules in question. Nor does the fact that the Rules may result in 'incidental individual inequality' make them offensive to the Fourteenth Amendment. Phelps v. Board of Education, 300 U.S. 319, 324."

* Spanos has been criticized. See Note, Retaining Out of State Counsel, supra 743-744.

The reasons given by the Kansas Supreme Court were, inter alia, failure of such attorneys to familiarize themselves with rules of local practice and procedure by reason of their infrequent appearance in Kansas, occasional failure of such attorneys to answer urgent calls in Kansas, and difficulty in procuring the presence of such attorneys at the call of dockets in Kansas courts. The reasons behind Justice Ball's policy are as persuasive, if not more so, as the reasons behind the restrictions in Martin v. Walton. Moreover, the effect of the restrictions in Martin v. Walton was to handicap a lawyer licensed to practice in Kansas from practicing in Kansas. A fortiori, the instant plaintiffs, who are not licensed in New York, have an even less tenable equal protection claim.

Martin v. Walton is clear authority for the proposition that a state may make distinctions among attorneys licensed to practice in that state and attorneys practicing elsewhere without offending the Constitution, providing these distinctions have some rational basis. That is exactly the case here. Martin v. Walton has been followed recently in a number of Courts of Appeals. Hawkins v. Moss, 503 F 2d 1171 (4th Cir. 1974) [state rule allowing bar exam exemption only to those attorneys admitted to practice in states granting reciprocity did not violate equal protection clause]; Aronson v.

Ambrose, 479 F 2d 75 (3rd Cir. 1973) [rule requiring applicant for admission to bar to allege and prove that if admitted he intends to reside as well as practice in the Virgin Islands was not, inter alia, a denial of equal protection]; Sams v. Ohio Valley General Hospital Assn., 413 F 2d 826 (4th Cir. 1969).

The fact that the distinctions made by Justice Ball may work incidental hardships to plaintiffs does not render those distinctions unconstitutional, as Martin v. Walton and its progeny have made clear. It is well settled that special burdens may be imposed upon defined classes in order to achieve permissible ends. Rinaldi v. Yeager, 384 U.S. 305 (1966).

The Supreme Court has never intimated that Martin v. Walton was in any way wrong. If there was any doubt, that doubt was removed in the Supreme Court's decision in Brown. Supreme Court of Virginia, 414 U.S. 1034 (1973). In Brown, the Supreme Court affirmed without opinion* a decision of a three judge district court which held that a Virginia requirement that foreign attorneys seeking admission to practice law generally in the state, on ground of reciprocity, be a permanent resident of Virginia and intend to practice full time as a member of the Virginia bar, while not requiring an

* A summary affirmance by the Supreme Court is tantamount to a full disposition of the matter on the merits. Mercado v. Rockefeller, 502 F 2d 666 (2d Cir. 1974), cert. pending.

attorney who has passed the exam to continue Virginia residency or maintain a full-time Virginia practice, was not a violation of inter alia, the equal protection clause. The result was achieved whether measured by the "rational relation" test or the "compelling state interest" test. The state's interest in providing informal, stable, and responsible bar was the quantitative and qualitative basis for the distinction. The reasons for distinctions drawn by Justice Ball are as persuasive, if not more so, than those in Brown. In sum, it is abundantly clear that plaintiffs' equal protection claim is not cognizable under the law.

B. Effective Assistance of Counsel

Plaintiffs argue that Justice Ball's policy deprives plaintiff-indictees of effective assistance of counsel. This argument is totally devoid of merit.

At the outset, there has never been any showing whatsoever that there are not sufficient number of New York counsel able or capable of representing Attica indictees effectively. That out-of-state counsel such as plaintiffs-attorneys may also effectively represent Attica indictees obviously proves nothing. Similarly, plaintiffs suggestion that the Attica defendants are "unpopular" individuals in whose cause New York State

attorneys will not pass muster has no basis whatsoever in either the record or the imagination. Plaintiffs also argue that the Attica cases are "extraordinary complex". This of course is irrelevant to the issue of effective assistance of counsel. Indeed, the very complexity of these cases supports the rational basis of Justice Ball's limitation of assignments to New York counsel. Counsel admitted to practice in New York are more likely to be familiar with the intricacies and subtleties of New York criminal law and procedure.

Plaintiffs' argument that plaintiff-attorneys "are not taking these cases for money" and are paying "expense money out of their pockets" (Pl. Br. 12) are simply irrelevant to the issue of effective assistance of counsel.* Similarly, the alleged bitterness and alienation of defendants, and the need for Attica defendants to have confidence in their attorneys, are also irrelevant to this issue. There is absolutely nothing in the record to suggest that Justice Ball's assignment policy has not provided all Attica indictees with effective assistance of counsel. and plaintiffs themselves do not appear to dispute this. Accordingly, plaintiff's effective assistance of counsel argument is really nothing more than a right to choice of assigned counsel in disguise.

* There never has been a claim that any out of state lawyer declined to represent a plaintiff-indictee for lack of funds.

C. Right to Travel

Plaintiff-attorneys claim that Justice Ball's ruling interferes with their right to travel under the privilege and immunities clause. This argument is totally devoid of merit. The cases clearly so hold.

The Supreme Court of the United States in Brown, supra, necessarily rejected this argument, since part of the holding in the three-judge court was that the Virginia rules did not impede the right to travel. Similarly the holdings in Aronson v. Ambrose, supra, and Hawkins v. Moss, supra, rejected right to travel arguments as well as equal protection arguments.

Plaintiffs attempt to rely on the residency requirement cases such as Shapiro v. Thompson, 394 U.S. 618 (1969), and Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) must be summarily rejected. The court in Shapiro v. Thompson clearly viewed the right to travel there as "migration", "resettling," "finding a new job," and "starting a new life." 394 U.S. at 629. This is a far cry from the situation of a professional seeking to practice law in a state where he is not licensed to practice. Indeed, the Supreme Court in both Shapiro and Maricopa County specifically stated that the holdings in those

cases were not to be construed as affecting the validity of residency requirements determining eligibility to, inter alia, obtain a license to practice a profession. Shapiro, 394 U.S. at 638, n. 21; Maricopa County, 415 U.S. at 259, n.13.

Obviously, no one is preventing plaintiffs-attorneys from coming to New York. That the State of New York, like other States, licenses persons practicing professions within her borders is not inconsistent with any right to travel and indeed is a proper exercise of New York's police power. This is surely beyond controversy.

D. Interstate Commerce Clause

Plaintiffs claim that Justice Ball's ruling is a burden on interstate commerce is totally devoid of merit. Plaintiffs fail completely to develop this argument in their brief, and apparently have completely confused the issues of interstate commerce and the right to travel. In any event, it is difficult to comprehend how Justice Ball's ruling is a burden on interstate commerce. Assuming arguendo a lawyer licensed in State A and representing a client pro hac vice in State B is engaged in interstate commerce, it is clear that such "commerce" in the case of professionals has always been subject to the reasonable licensing and other requirements of the host

state which it may impose pursuant to the police power.

POINT III

THE REASONABLE EXERCISE OF DISCRETION BY APPELLEE JUSTICE BALL MAY NOT BE DISTURBED BY THIS COURT (A) THROUGH THE EXTRAORDINARY REMEDY OF MANDAMUS, AND (B) IS ENTITLED TO THE PROTECTION OF JUDICIAL IMMUNITY.

Plaintiff-attorneys seek relief in federal court by way of mandatory injunction to have Justice Ball exercise his discretion by assigning them as counsel in a state court trial. Plaintiffs completely misconceive the fundamental principles of mandamus and judicial immunity.

A. Mandamus

It is well settled that mandamus lies only to compel the performance of a ministerial act and not to compel the exercise of discretion in a particular way. Zerilli v. Thornton, 428 F 2d 476 (6th Cir. 1970); Casarino v. United States, 431 F 2d 775 (2d Cir. 1970); United States v. Griesa, 481 F 2d 276 (2d Cir. 1973); Weight Watchers of Philadelphia v. Weight Watchers International, 455 F 2d 770 (2d Cir. 1970), mandamus denied 55 FRD 50. Even gross errors of judgment in a lower court would not justify a writ of mandamus. Stans v. Gagliardi, 485 F 2d 1290 (2d Cir. 1973).

In United States v. Griesa, supra, the Government asked this Court to enjoin the District Court's transfer order for a trial. Recognizing that the lower court's decision was essentially a question of judgment and discretion, this Court ruled that "(w)e do not view this as an appropriate use of the extraordinary writ."

This reluctance to interfere with an interlocutory discretionary judgment by way of mandamus should be even more pronounced in criminal case. In Will v. United States, 389 U.S. 90 (1967), the Supreme Court of the United States noted the usual reluctance to allow appeal of interlocutory orders through mandamus should be even more applicable in the context of criminal cases. The Court noted that it had never approved the use of the writ to review an interlocutory order in a criminal case which did not have the effect of dismissal.

Notwithstanding these obvious and fundamental principles, plaintiffs ask this Court to compel a state judge to exercise his discretion in a particular manner satisfactory to plaintiffs. Clearly, however, plaintiffs are not entitled to mandamus relief as a means of interfering with Justice Ball's discretion.

B. Judicial Immunity

Plaintiffs' suit against Justice Ball is also barred by the doctrine of judicial immunity. As plaintiffs note, there is authority holding that the doctrine of judicial immunity, while a bar to suits for damages, is not a a bar to suits seeking equitable relief. However, this is "by no means clear." Law Students Civil Rights Research Council v. Wadmond, 299 F. Supp. 117, 123 (S.D.N.Y. 1969), affd 401 U.S. 154 (1971).

It is respectfully submitted that the rule of judicial immunity applies whereever the policy reasons and rationale for that rule may be present, regardless of the label attached to the nature of relief being sought. Mackay v. Nesbett, 285 F. Supp. 498 (1968 D. Alaska), affd 412 F 2d 846 (9th Cir. 1969). A principal policy reason and rationale for the rule of judicial immunity is the public's interest in courts which are at liberty to exercise their functions with complete independence. Pierson v. Ray, 386 U.S. 547, 554 (1967). This interest is present when a judge's discretionary judgment is put in issue. This has been recognized by the Fifth Circuit in Cheramie v. Tucker, 493 F 2d 586 (5th Cir. 1974), where a plaintiff sought equitable relief under the Civil Rights Act against three state appellate judges who had reversed a judgment rendered for plaintiff in the State trial court. The

Fifth Circuit noted that there seemed to be a body of authority holding the immunity doctrine applicable only to suits for damages and not to suits in equity. As to the latter, however, the Court said:

> "Rarely in this line of cases has there been any real interference with the discretionary functions of a judge. In the instant case the requested relief would directly or irrebutably interfere with a discretionary judicial function." Cheramie v. Tucker, supra, at 588.

Similarly, in Bilick v. Dudley, 356 F Supp. 945 (S.D.N.Y. 1973), the court while granting equitable relief against a state court judge to perform the ministerial act of expunging arrests from the record, emphasized that

> "where, as here, there is no interference with any real judicial function, there is no immunity from suit under 42 U.S.C. § 1983" Bilick v. Dudley, supra, at 953.

Here plaintiffs are seeking mandamus not to compel the performance of a ministerial function but to interfere with the essence of the judicial function. In such a case the doctrine of judicial immunity is a bar.

CONCLUSION

THE ORDER OF THE DISTRICT COURT SHOULD BE AFFIRMED

Dated: New York, New York
April 24, 1975

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Hon. Justice Ball

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APPELLEE'S SUPPLEMENTARY
APPENDIX

Cream Affidavit of October 17, 1974, in support of Appellee Ball's Motion to Dismiss.*

* Evidently this was left out of plaintiffs' appendix by mistake.

APPELLEE'S SUPPLEMENTARY APPENDIX

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* Evidently this was left out of plaintiffs' appendix by mistake.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE BEDROSIAN and THOMAS HAGAN, ROBERT HANDELMAN and BERNARD SHIPMAN, WALTER WILLIAMS and OTIS McGAUGHY (OMAR SEKOU TOURE), and all others similarly situated,

Plaintiffs,

-vs-

JOSEPH MINTZ, Administrator, Erie County Bar Association Aid to Indigent Prisoners Society, Inc.; the ERIE COUNTY BAR ASSOCIATION AID TO INDIGENT PRISONERS SOCIETY, INC.; and CARMAN F. BALL, Justice of the Supreme Court and Presiding Judge of the Additional Special Trial Term of the Wyoming County Court, in his representative and individual capacity,

Defendants.

NOTICE OF MOTION

CIV-74-286

PLEASE TAKE NOTICE, that the undersigned will move this Court at Part I, United States Court House, Buffalo, New York, on the 22nd day of October, 1974 at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order dismissing the complaint herein on the grounds that the complaint fails to state a claim upon which relief may be granted pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure as more fully set forth in the Affidavit in Support of Motion.

DATED: Buffalo, New York
October 17, 1974

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendant Justice
Ball

By: _____

DOUGLAS S. CREAM
Assistant Attorney General
Office & P. O. Address:
65 Court Street
Buffalo, New York 14202

TO:

HERMAN SCHWARTZ, ESQ.
Attorney for Plaintiffs
Room 525, John Lord O'Brian Hall
SUNYAB-North Campus
Buffalo, New York 14260

2300 Erie Co. Bank Bldg.
Buffalo, New York

RICHARD F. GRIFFIN, ESQ.
Attorney for Erie County Bar Association

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE BEDROSIAN and THOMAS HAGAN, ROBERT HANDELMAN and BERNARD SHIPMAN, WALTER WILLIAMS and OTIS McGAUGHY (OMAR SEKOU TOURE), and all others similarly situated,

Plaintiffs,

-vs-

JOSEPH MINTZ, Administrator, Erie County Bar Association Aid to Indigent Prisoners Society, Inc.; the ERIE COUNTY BAR ASSOCIATION AID TO INDIGENT PRISONERS SOCIETY, INC.; and CARMAN F. BALL, Justice of the Supreme Court and Presiding Judge of the Additional Special Trial Term of the Wyoming County Court, in his representative and individual capacity,

Defendants.

AFFIDAVIT IN SUPPORT OF MOTION

CIV-74-286

STATE OF NEW YORK)
COUNTY OF ERIE) SS.:
CITY OF BUFFALO)

DOUGLAS S. CREAM, being duly sworn, deposes and says:

1. That he is an Assistant Attorney General, of Counsel to LOUIS J. LEFKOWITZ, Attorney General of the State of New York, attorney for defendant Carman F. Ball, Justice of the Supreme Court.

2. That this affidavit is submitted in support of defendant, Justice Ball's motion to dismiss the complaint.

3. That by interrogatory dated June 27, 1974, counsel for plaintiffs requested of defendant Justice Ball the reasons for his decision not to assign attorneys (to represent certain criminal) defendants which attorneys are not licensed to practice law in the State of New York.

4. That the response to the aforesaid interrogatory is annexed hereto and made a part hereof.

5. That pursuant to County Law Article 18-B, defendant, Justice Ball, assigned counsel to those indigent defendants who requested the assignment of counsel.

6. That pursuant to County Law Article 18-B, the attorneys so assigned were selected from a list compiled and administered by the Erie County Bar Association Aid to Indigent Prisoners Program.

7. That in addition to the above-referenced list and in response to the extraordinary circumstances of the Attica trials, defendant Justice Ball exercised the inherent discretionary powers of the Court and permitted certain indigent defendants to request the assignment of attorneys admitted to practice law in the State of New York.

8. That certain indigent defendants rejected both offers of assignment of counsel by defendant Justice Ball and requested the assignment of counsel not admitted to practice law in the State of New York.

9. That in the exercise of his judicial discretion, Justice Ball declined to grant the aforementioned request.

10. That upon the further request of those indigent defendants and upon the motion of certain of the out-of-State attorneys, Justice Ball admitted those attorneys pro hac vice to practice law in the State of New York.

11. That the aforesaid pro hac vice admissions of those attorneys, now before this Court as plaintiffs, to practice law in the State of New York were made solely upon the representation of the plaintiff-defendants that they were satisfied that the attorneys so admitted were qualified to adequately represent them. See Exhibit II annexed hereto.

12. That the aforesaid pro hac vice admission of plaintiff-attorneys were made in the exercise of Justice Ball's judicial discretion pursuant to the Rules of the New York State Court of Appeals §520.8(d) (1).

13. That the aforesaid rule does not require that the Court so admitting an attorney certify the competence of the attorney, nor did Justice Ball at any time certify the competence of any such attorney.

14. That as evidenced by Exhbits I and II annexed hereto, there were, and continue to be, attorneys available to be assigned from the list maintained by the Erie County Bar Association Aid to Indigent Prisoners Society.

15. That plaintiff-defendants allege various violations of their constitutionally protected rights as a result of the exercise of Justice Ball's judicial discretion.

16. That plaintiff-defendants have no constitutionally protected right to assigned counsel of their own choosing. U.S. v. Torta, 464 F. 2d 1202 (2d Cir. 1972), cert. denied 409 U.S. 1063, 93 S. Ct. 554, U.S. v. White, 451 F. 2d 1225 (Cir. 1971).

17. That plaintiff-defendants allege (paragraph 15-a of the complaint) that their right to effective assistance of counsel is abbrogated by virtue of Justice Ball's exercise of judicial discretion.

18. That if in fact the counsel retained by plaintiff-defendants are unable to effectively represent said defendants, plaintiff-defendants have knowingly and voluntarily waived such rights by virtue of their refusal to accept in-State assigned counsel.

19. That plaintiff-attorneys allege that their constitutionally protected rights are being abbrogated by virtue of the exercise by Justice Ball of his judicial discretion in that:

> Paragraph 14 of the complaint - plaintiff-attorneys are being denied equal protection of the laws and their right to travel is being infringed.
>
> (b) an impermissible burden on their practice of their profession is imposed.
>
> (c) an impermissible burden on travel and on interstate commerce is imposed.
>
> (d) their right to practice their profession in other states if qualified and competent to do so is infringed.

20. That plaintiff-attorneys are free to travel in interstate commerce if they so choose.

21. That plaintiff-attorneys have been admitted to practice pro hac vice and are free to practice their profession in this State relative to the trials for which they have been so admitted.

22. That plaintiff-attorneys are in fact claiming a constitutional right to be assigned as counsel which right is non-existent.

23. That Justice Ball exercised his judicial discretion not to assign out-of-State counsel for the reasons as set forth in his affidavit annexed hereto as Exhibit I.

24. That this Court is being asked by plaintiffs to review the exercise of a purely discretionary act by Justice Ball.

25. That by petition pursuant to Article 78 of the Civil Practice Law and Rules, dated April 15, 1974, plaintiff-defendant Stroble and others sought an order of mandamus from the New York Supreme Court, Appellate Division, for the Fourth Judicial Department, ordering Justice Ball to assign petitioner out-of-State counsel to plaintiff-defendant Stroble.

26. That the Appellate Division found that the policy of Justice Ball which is now before the Court was a valid exercise of judicial discretion. Matter of Goodman, 45 A.D. 2d 16 (4th Dept. 1974).

27. That leave to appeal to the Court of Appeals was denied by order dated July 11, 1974.

28. That by reason of all of the foregoing, plaintiffs have failed to state a cause of action for which relief may be granted pursuant to 42 U.S.C. §1983.

WHEREFORE, defendant Justice Carman Ball respectfully requests that this Court enter an order dismissing the complaint and further grant such other and further relief as to the Court may seem just and proper.

DOUGLAS S. CREAM

Subscribed and sworn to before me
this 17th day of October, 1974.

Commissioner of Deeds, Buffalo, N.Y.
Commission expires December 31, 1974.

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Ghislaine Salomon , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Appellee Ball herein. On the 25th day of April , 1975, she served the annexed upon the following named persons:

MR. HERMAN SCHWARTZ
525 O'Brien Hall
SUNYAB North Campus
Buffalo, New York 14260

RICHARD F. GRIFFIN, ESQ.
MOOT, SPRAGUE, MARCY LANELY,
FERNBACH & SMYTHE
2300 Two Main Place
Buffalo, New York 14202

Attorney / and other party in the within entitled action by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney / and other party at the address within the State designated by them for that purpose.

Ghislaine Salomon

Sworn to before me this
25th day of April , 1975

Ralph J McMurray

Assistant Attorney General
of the State of New York